82-1112

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LEONARD P. KLINE,

Petitioner,

v.

CITY OF FAIRFAX, VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

May the City of Fairfax, Virginia, compatibly with the Fifth and Fourteenth Amendments' proscription against deprivation of property without due process of law, impose an ordinance which retroactively divests Chief Kline, the Petitioner, of his right at retirement to be paid for his vested and unused accumulated leave?

PARTIES TO THE PROCEEDINGS

1. Leonard P. Kline, former Chief of Police for the City of Fairfax, Virginia and the Plaintiff-Appellant below is the Petitioner herein.

2. The City of Fairfax, a municipal corporation organized under the laws of the Commonwealth of Virginia, was the Defendant-Appellee below and is the Respondent herein.

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Leonard P. Kline, former Chief of Police for the City of Fairfax, Virginia, petitions for a writ of certiorari to review the Judgment of the Supreme Court of Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The Order of the Supreme Court of Virginia denying the petition for writ of error was entered on October 8, 1982, and appears at page 1a of the Appendix to this Petition.

The Final Judgment Order of the Circuit Court of Fairfax County, Virginia, was entered on October 16, 1981, and appears at page 2a of the Appendix.

The findings and rulings of the Circuit Court of Fairfax County, Virginia, were set forth in a letter opinion dated July 21, 1981, and the opinion appears at page 4a of the Appendix to this Petition.

JURISDICTION

The Order of the Supreme Court of Virginia denying review of the dismissal of Plaintiff's Motion for Judgment was entered October 8, 1982 (App. A). A timely Petition for Writ of Certiorari to the Supreme Court of Virginia is hereby submitted to this Court and jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

The Fifth and Fourteenth Amendments of the United States Constitution are set out in the Appendix at 7a.

Ordinance No. 1974-4 providing for a system of personnel administration for employees in the career service of the City of Fairfax, Virginia was adopted by the City Council of the City of Fairfax, Virginia on May 21, 1974 and became effective on July 1, 1974. It is set out at page 8a of the Appendix.

Ordinance No. 1975-27 amending the system of personnel administration was adopted on June 17, 1975 by the City Council of the City of Fairfax and is included at page 27a of the Appendix.

Ordinance No. 1975-52 amending the system of personnel administration was passed by the City Council

on October 20, 1975. It is set out at page 29a of the Appendix to this Petition.

STATEMENT OF THE CASE

This Petition arises from the dismissal of Leonard Kline's Motion for Judgment against the City of Fairfax, Virginia.

Leonard P. Kline was employed as a police officer by the City of Fairfax from August 15, 1953 until June 30, 1977. When Mr. Kline retired in 1977, after almost twenty-four years of service, he was Chief of Police for the City of Fairfax and he had accrued a substantial amount of earned, but unused, "leave". If Chief Kline had retired prior to October 20, 1975, after twenty-two years of faithful service, instead of working almost two more years, he would have retired with a lump sum payment for his unused leave just as many Fairfax City employees did before October, 1975. Chief Kline, however, relied on the fact that "leave" he had earned, but not used due to job dedication and fortunate good health, would be honored and compensated when he finally retired. For this reason, and others, Chief Kline did not retire after twenty-two years—he gave the City of Fairfax nearly two years of additional service only to find that the compensation he relied on and expected in payment of his unused leave would not be honored.

Chief Kline alleged that his reliance on and expectation of compensation for his earned leave was retroactively undermined by the City of Fairfax and amounted to a deprivation of property without due process of law. The Circuit Court of Fairfax County, Virginia by letter opinion dated July 21, 1981 and by final judgment entered October 16, 1981 dismissed Chief Kline's claim.

The Supreme Court of Virginia refused Chief Kline's petition for appeal on October 8, 1982.

FACTUAL BACKGROUND

Prior to July 1, 1974, employees of the City of Fairfax accumulated "annual" and "sick" leave pursuant to an established employee benefit plan of the City, as follows:

> An Employee could accumulate, at a prescribed rate according to days worked, a maximum of thirty days annual leave and an unlimited amount of unused sick leave.
>
> Annual leave in excess of thirty days was converted to sick leave.
>
> In addition to the permissible use of these categories of leave during the term of employment, upon separation from employment, an employee received money payment for accumulated annual leave up to the thirty day maximum.
>
> Also upon separation, unused sick leave would count toward the thirty day maximum annual leave to be paid on the basis of one day annual leave for each three days accumulated sick leave.

In late 1973 and through the first half of 1974, the City of Fairfax wanted to improve its personnel program in several respects. City management was aware of some employee unrest and was very concerned about attempts to organize and unionize the Police Department. (McNayr Tr. 36-38, Fleck Tr. 10-13.) There was also concern about excessive use and abuse of sick leave by certain employees. Moreover, a formal personnel policy was required to be adopted by cities pursuant to state law. Code of Virginia 1950 as Amended § 15.1-7.1. In

order to conform to statute, for the other specified reasons, and to improve employee morale and productivity, the City Manager, Irving McNayr, hired Mr. Jack Foster, retired Personnel Director of Artlington County, Virginia, as a consultant "to come up with a program which would be acceptable to all of the personnel and, of course, to the City Council." (McNayr Tr. 36-39, 41-43, 45-57, Fleck Tr. 10-11, Foster Tr. 4-7, 14-15, 21-23; see also reasons set forth in Exhibits 10-A and 10-B.)

Mr. Foster knew that the City had long experience with certain employees using sick leave as fast as they earned it (Foster Tr. 32), and so he proposed a modification of the system of accumulation, use, and payment for leave along the lines of programs in private industry. This proposal was a part of revamping the entire personnel system. The change was discussed with all employees, on both an individual and group basis. All had an opportunity to participate in the discussions, and suggested changes were considered. When employees objected to the fact that 2 hours less sick leave per pay period and 4 hours "bonus" per year were lost under the new ordinance, the employees were told by management that they had to "give up something to get something," *i.e.*, the number of hours accumulated would be reduced in return for the benefit of being paid for unused accumulated hours. (Kline Tr. 131, Fleck Tr. 7-8, Foster Tr. 7-8, McNayr Tr. 44-45, 57-58.)

Drafts of a proposed ordinance went to all employees and to the City Council. When everyone finally concurred the result was the 1974 ordinance which for the first time established a formal personnel policy and pay plan for the City. (Foster Tr. 23-24.) By City ordinance effective July 1, 1974 (App. p. 8a) the old employee

benefit plan was changed as follows: The categories of "annual" and "sick" leave were eliminated and a single category of "leave" was created. All earned, but unused leave ("annual" and "sick") was combined into a new total of "leave" (for example, thirty days "annual" and thirty days "sick" leave became sixty days "leave"). Upon separation, "leave" above thirty days was to be paid on the basis of one day for each two days accumulated. No limit was established on the total number of unused "leave" days which would be paid upon separation from employment, except that ten days accumulated "leave" had to be taken each year or it was lost to the employee.

In addition to improved employee morale, benefits of the new plan to the City were: the elimination of the 4 bonus hours of leave previously granted at the end of each year, and two hours per pay period of sick leave. Thereafter, the employees didn't take sick leave as often as they formerly took it. Also, financial cost was considered by the drafters of the original ordinance. The cost of the program to the City would likely be less because (1) fewer actual hours of leave would be accumulated; (2) more efficiency would be obtained from employees with higher morale who did not use sick leave for flimsy reasons; (3) under the old system there was a tendency of employees to use up sick leave before retirement so that the leave was not "lost"; *i.e.*, no difference if an employee was paid for not working because he was "sick" or because he was entitled to payment for unused leave at retirement.[1] (Foster Tr.

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[1] Actually, under the old system, an employee who used up sick leave would be paid day for day, but he was not paid on a one for one basis for unused leave under the new system.

8-9, 11-13, 18-19, 24-25, Kline Tr. 137-138, Fleck Tr. 12-15, McNayr Tr. 43-44.)

In the spring of 1975, the City started preparing to sell bonds to upgrade its sewer system. Auditors for the City and a financial consultant from New York told the City that it had to include the value of its leave program in its financial statement. In order to reduce the City's "debt," new City Manager George Hubler decided to ask the City Council to rescind the leave portion of the 1974 ordinance, and thereby wipe out approximately $150,000.00 of obligations. Mr. Hubler admitted, however, that there were options to improve the financial statement other than retroactively taking away the right of employees to be paid for unused leave at retirement. He also admitted that the City was in no great financial crisis because of its leave program. (Hubler Tr. 174-179, 185-186, 189-191, 193-196.)

On July 17, 1975, the 1974 ordinance was amended, prospectively only, by the City Council of the City, as follows: a limit of payment for forty-five days "leave" was to be paid upon separation, for all "leave" accrued *subsequent* to June 17, 1975. "Leave" in excess of thirty days was to be paid on a ratio of one day for each two days accrued.

On October 20, 1975, the City Council of the City again amended the ordinance by reconstituting the "leave" for the period prior to July 1, 1974, into "annual" and "sick" leave designations. All leave over thirty days was now to be paid on a ratio of one day for each two days accrued. The ordinance stated that, "No payment will be made for sick leave accrued upon separation or retirement from City service." The Council made these provisions *retroactive.*

As a result of the actions taken by the City on October 20, 1975, Leonard Kline lost the right to be paid for his unused leave at the time of his separation from employment (in his case by retirement) from the City. Prior to October 20, 1975, Chief Kline could have retired and received a lump sum payment (certain former employees of the City did just that); after the council meeting of October 20, 1975, such payment could not be obtained. (Kline Tr. 123-124.) It is on the basis of a retroactive taking of vested rights that the Petitioner brought his action for deprivation of property without due process of law.

FEDERAL QUESTION RAISED

Petitioner seeks review of issues involving the Fifth and Fourteenth Amendments of the Constitution of the United States which were timely raised below and decided adversely to the Petitioner. The Federal Constitutional provisions protect against the deprivation of property without due process of law yet the City of Fairfax, Virginia, in violation of these amendments, passed an ordinance that retroactively divested Chief Kline of his right to compensation for earned but unused leave accumulated prior to October 20, 1975. This Court is presented with an opportunity to consider and clarify the important question of whether leave benefits of a public employee, earned during the period of employment, are vested property rights within the meaning of the Fifth and Fourteenth Amendments such that they will be protected against retroactive deprivation by state action.

REASONS FOR GRANTING THE WRIT

I.

WHERE A STATUTE OR CONTRACT PROVIDES THAT A PUBLIC EMPLOYEE MAY ACCUMULATE LEAVE WITH CASH ON TERMINATION, THE BENEFIT IS VESTED AS SOON AS LEAVE IS ACCUMULATED AND IT BECOMES A FIXED INTEREST WHICH AS A MATTER OF CONSTITUTIONAL DUE PROCESS SHOULD BE PROTECTED AGAINST RETROACTIVE STATE ACTION.

1. Ordinance Provisions.

This case presents the spectacle of a Virginia municipality granting by ordinance certain compensation and leave benefits to its employees only to retroactively divest said employees of accumulated benefits when the City later had a need to improve the appearance of its financial statement.

In late 1973 and early 1974 the City of Fairfax was concerned about employee unrest and the possibility of Teamster organization of the Police Department. In addition, the City was under statutory mandate to formulate official personnel policies. Code of Virginia 1950 as amended § 15.1-7.1. To conform to state law, and in order to improve employee relations, the City adopted Ordinance 1974-4 on May 21, 1974 which provided that, "After successful completion of the probationary period, the employee [would be] entitled to the full benefits of a Career Service employee as provided by [the] ordinance." One such benefit was agreed to as follows:

> Upon separation or retirement an employee shall be paid in full for all accrued leave up to a maximum of 30 work days (240 hours). Leave in excess of

> 30 days shall be paid on a ratio of one day for each two days accrued.

In late spring of 1975, barely one year after the formulation of the City's system of personnel administration, a *prospective* amendment of Ordinance 1974-4 was passed by the City Council. City of Fairfax, Virginia, Ordinance 1975-27. The newly formalized leave benefits were trimmed as far as *future* compensation of accumulated leave was concerned. Since this action was prospective in nature, Petitioner has no due process argument with the validity of the Ordinance. The new benefit provision read as follows:

> Upon separation or retirement an employee shall be paid in full for all accrued leave up to a maximum of 30 work days (240 hours). Leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued, *not to exceed payment for 15 additional days (120 hours). This 45-day limit shall apply for leave accrued from the date of the adoption of this ordinance.*

(Emphasis added.)

Within three months the City Council once again amended Ordinance 1974-4 by reconstituting leave accumulated prior to July 1, 1974 into "annual" and "sick" leave. City of Fairfax, Virginia Ordinance 1975-52. Leave accrued after July 1, 1974 and up to the adoption of the amendment was to be treated as "annual" leave. After the date of the amendment, "sick" leave would accrue for full-time employees at the rate of four hours for each two week pay period. Upon separation or retirement the new amendment allowed payment for "annual" leave accumulated as follows:

> Up to a maximum of 30 days accrued annual leave shall be paid on the basis of one day for each day

> of annual leave accrued. Accrued annual leave in excess of 30 days shall be paid on a ratio of one day for each two days accrued.

"Sick" leave was dealt with summarily:

> No payment will be made for sick leave accrued upon separation or retirement from City Service.

This new amendment, of course, had the effect of *retroactively* divesting long term employees of all leave accumulated prior to July 1, 1974 that was "reconstituted" into "sick" leave. In Chief Kline's case his leave balance was reconstituted into 1,587 hours "sick" leave and 355 hours "annual" leave. Thus, the value of his retroactively divested "sick" leave was $12,763.42. (Trial Exhibit 38.)

2. Vested Benefit Rights.

It has been stated that the Federal Constitution's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property rights—can take many forms. *See, Board of Regents v. Roth,* 408 U.S. 564 (1972). As elaborated in *Roth*:

> To have a property interest in a benefit a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be artibrarily undermined.
>
> * * *
>
> Property rights, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or under-

> standings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. 564, 577.

"Leave" is a claim upon which employees rely in their daily lives and they have more than an abstract need for such benefits. An employee typically plans his vacation, determines the wisdom of taking sick days and even considers his retirement based on his reliance on earned leave being honored. It is with this in mind that courts have stated that leave benefits are part of an employee's overall compensation earned during the period of employment. *See, Vangilder v. City of Jackson,* 492 S.W.2d 15 (Mo. App. 1973). Moreover, it has been held (in keeping with the *Roth* Court's view that property rights are created and defined by existing rules such as state laws), that where a statute provides that employees may accumulate leave with cash payment on termination, the leave benefit is *not contingent,* but is vested as soon as the leave is accumulated. *Christian v. County of Ontario,* 399 N.Y.S. 2d 379 (1977); *Harryman v. Roseburg Rural Fire Protection District,* 244 Ore. 631, 420 P.2d 51 (1966).

Chief Kline has been deprived of a vested property interest created by City ordinance—a specific benefit was earned by Chief Kline and he relied on it being honored, not retroactively rescinded.

II.

THIS CASE PRESENTS ISSUES OF CENERAL IMPORTANCE DIRECTED TO THE RELATIONSHIP BETWEEN TERMS OF PUBLIC EMPLOYMENT AND DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION—ISSUES WHICH MERIT THE CONSIDERATION OF THIS COURT.

In *State of Mississippi v. Miller,* 276 U.S. 1974 (1928), a statute which retroactively reduced the amount of compensation that a revenue agent was to receive was reviewed by this Court. In invalidating the statute, the Court stated as follows:

> It is well understood that the contract clause does not limit the power of a state during the terms of officers to pass and give effect to laws prescribing for the future the duties to be performed by, or the salaries or other compensation to be paid to, them. *Butler v. Pennsylvania,* 10 How. 402, 13 L. Ed. 472. But, after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed. The selection of plaintiff to be the revenue agent amounted to a request or direction by the state that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suits to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the state, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of Chapter 170 would take from him a part of the amount that he had theretofore

> earned. That would impair the obligation of the implied contract under which he became entitled to the commissions. This case is ruled by *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S. Ct. 329, 29 L. Ed. 587.

This Court has thus recognized that although it may be correct that public employees have no contractual or vested right to the public office itself, it does not necessarily follow that contractual or vested rights in benefits of the office cannot accrue. This fact was also recognized in *Bennett ex rel. Arizona State Personnel Commission v. Beard*, 27 Ariz. App. 534, 556 P.2d 1137 (1976). In *Beard*, an employee of the Arizona Highway Department brought suit to invalidate an action by the Arizona State Personnel Commission. The Commission had instituted a new policy under which annual leave would accrue at the rate of only ten hours per month as compared to the prior rate of twelve hours per month. This change resulted in the plaintiff being entitled to only fifteen days annual leave instead of the eighteen days he had previously enjoyed. Unlike the action taken in the case at bar, however, this change was not made retroactive. Since the change was prospective only, the court held that the plaintiff had no contractual right to continue his past leave benefits into future employment. The Commission's prospective change could be invalidated only if it was in violation of a formal written contract or a statute prohibiting such a change.

The Court in *Beard* made it clear that if the change had been made retroactive, it would have been invalidated. In reaching this conclusion, the court agreed that public employees have no contractual or property right to continued employment. However, according to the court, that principle of law should not prevent a court

from invalidating any retroactive impairment of rights which have already vested. The court stated:

> The state, having the right to take the most drastic step involved with appellee's "contract of employment"—termination—without liability, may the state without liability take the less drastic step of changing the terms of appellee's future employment by way of compensation, that is, benefits? The answer is obviously yes, *provided* that the change does not impair rights vested by reason of the prior employment. *Yeazell v. Copins*, [98 Ariz. 109, 402 P.2d 541 (1965)]. Under this analysis, the commission could not, say in July, 1969, pass a rule that provided that retroactive to January 1, 1969, appellee's leave benefits would be computed at a rate less than was previously in effect from January 1, 1969 to July, 1969. Such a result is prohibited by *Yeazell* as affecting benefits vested by reason of appellee's compliance with the conditions precedent to earning those benefits—his continued employment during that period.

556 P.2d at 1140 (Court's emphasis).

Accordingly, the key to determining whether rights have vested is whether all of the conditions precedent to the earning of the benefits have been satisfied. In *Beard*, there was only one condition with which it was necessary for the employer to comply in order for his rights to vest—his continued employment during the period when the prior law was in effect. Since he had satisfied that condition, he had acquired vested rights of which he could not be retroactively deprived by the government. Based on such reasoning, the Petitioner, Chief Kline, had a vested right in payment of accrued leave according to the terms of the prior ordinance. Like the plaintiff in *Beard*, Chief Kline was required to comply with only

one condition subsequent in order for his rights to vest—continued employment during the period when the prior law was in effect. Having complied with that requirement, Leonard Kline acquired a vested right of which the municipality could not lawfully deprive him.

In a similar case, a Michigan court held that the plaintiffs, inspectors employed by the Public Service Commission, by continuing their employment through the duration of the period for which the law in question was in effect, had acquired a vested right in the benefits provided for in that law. *Ramey v. State,* 296 Mich. 449, 296 N.W. 323 (1941). The law provided that employees in the classified civil service were to be given vacations with pay and that any such employee who was separated from employment without having taken his vacation was to be compensated for that unused benefit. Later, the plaintiffs' positions were removed from the classified civil service, on the basis of which the state argued that they were not entitled to reimbursement for unused vacation time. The court held that since the employees had acquired vested rights to the benefits, it was unlawful for the state to have deprived them of the benefits. The court stated as follows:

> "Under the facts in this case, plaintiffs had performed all acts necessary to insure to themselves the right of a vacation with pay, or if dismissed before exercised, to receive compensation for the unused portion of their annual leave allowances. There was nothing remaining for them to do except exercise the right which depended on no contingency, but was complete and matured. In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered. It is a rule that after the services are rendered under a law which fixes the rate of compensation, there arises an

> implied contract to pay for those services at that rate and the contract cannot be impaired by subsequent legislation." *Fisk v. Jefferson Police Jury,* 116 U.S. 131, 6 S. Ct. 329, 29 L. Ed. 587; *Robertson v. Miller,* 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517.

296 N.W. at 325.

According to the court in *Ramey,* not only did the plaintiffs have a vested right to the benefits, they also had an implied contract which could not be impaired by subsequent legislation. This interpretation is consistent with this Court's view in *State of Mississippi v. Miller,* 276 U.S. 1974 (1928).

State courts in numerous other cases have held that vested rights to employment benefits cannot be taken away from a public employee. *See Clift v. City of Syracuse,* 45 App. Div. 2d 596, 360 N.Y.S.2d 356 (1974) (the court held that an employee who had been discharged before he could use his accumulated sick leave was deprived of property without due process, since vacations are conditions of employment, not gratuities); *Vangilder v. City of Jackson,* 492 S.W.2d 15 (Mo. App. 1973) (sick leave benefits were held to be part of an employee's overall compensation, earned during the period of his employment and forming a part of his employment contract); *Harryman v. Roseburg Rural Fire Protection District,* 244 Ore. 631, 420 P.2d 51 (1966) (the court rejected the argument that sick leave was mere gratuity for city employees and held that since the plaintiff had accepted employment on the assumption that sick leave was part of his compensation for services, it was a contractual term of employment); *City of Orange v. Chance,* 325 S.W.2d 838 (Tex. Civ. App. 1959) (payment for unused sick leave was not merely a

gratuity, but rather was part of the employee's overall compensation).

For the reasons discussed above, the divesting of Chief Kline's right to be paid for his unused leave was a taking of property without due process of law. The City's action is comparable to giving an employee a bonus contingent on his continued work for a specified period. After the period passes and the bonus vests, the bonus is abolished without notice or a hearing. Whether a municipality may pass an ordinance such as the one involved here and abolish vested property rights without notice is an issue worthy of review by this Court.

CONCLUSION

This Court should take this case for its full review. From the above, one of the last analogous decisions of this Court on the subject of divesting public employee entitlements is *State of Mississippi v. Miller,* 226 U.S. 1974 (1928). Today, public employees are increasingly compensated by what are often termed "fringe benefits" in addition to salary. No doubt, benefits such as the right of Chief Kline to be paid for his unused leave in accordance with a local law should not be thought of as on the "fringe" of his total compensation package; rather the entitlement to be paid on retirement is an elemental part of that package which constituted his remuneration for faithful public service. *See, e.g., Christian v. County of Ontario,* 399 N.Y.S.2d 379 (1977). Elemental fair dealing is at odds with the City of Fairfax in this case, and elemental fairness is at the heart of the due process clause. The tangible rewards of public service are too few to permit further discouragement to those who consider careers as servants of us all. The millions of public servants, both state and federal,

look to this Court to condemn arbitrary action, including the divesting of accrued entitlements. This case is important to these millions, and is worthy of this Court's full attention and decision. The issue is simple, the facts are uncomplicated, the import is far reaching, the need for the highest precedence is clear. This petition should be granted.

Respectfully submitted,

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